

United States
Circuit Court of Appeals

For the Ninth Circuit.

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD and FRED HOWARD,
Appellees.

Transcript of Record

Upon Appeal from the District Court of the
United States for the Southern District
of California, Central Division.

FILED

APR 2 - 1942

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JAMES P. CLARK, Esq.,
704-6 Grant Building,
355 South Broadway,
Los Angeles, California.

For Appellees:

PAUL LEITER, Esq.,
1101 Black Building,
357 South Hill Street,
Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for
the Southern District of California, Central
Division.

In Bankruptcy
No. 38,621-M

In the Matter of

FRANCES HOWARD, FRED HOWARD,
husband and wife

Debtors

DEBTOR'S PETITION IN PROCEEDINGS
UNDER SECTION 75 OF THE BANKRUPTCY
ACT.

To the Honorable, Judge of the District
Court of the United States for the Southern
District of California:

The Petition of Frances Howard, and Fred Howard, husband and wife, Residing at No. Lake Hughes, Star Route, County of Los Angeles, State of California, respectfully represents:

That they *is* primarily bona fide personally engaged in producing products of the soil (or that *he* is primarily bona fide personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations) as follows:

Raising and production of turkeys, chickens
(1200 head) fruit trees and vegetables for all

family consumption on N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of
Section 31 Twp. 8 N., Range 16 E. S. B. B. M.

that such operations occur in the county (or coun-
ties) of Los Angeles within said judicial district;
that *he is* insolvent (or unable to meet *his* debts as
they mature); and that *he* desires to effect a com-
position or extension of time to pay *his* debts under
Section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A",
and verified by your petitioner's oath, contains a
full and true statement of [2] all *his* debts, and (so
far as it is possible to ascertain) the names and
places of residence of *his* creditors, and such further
statements concerning said debts as are required
by the provisions of said Act.

That the schedule hereto annexed, marked "B",
and verified by your petitioner's oath, contains an
accurate inventory of all *his* property, both real
and personal, and such further statements concern-
ing said property as are required by the provisions
of said Act.

Wherefore your petitioners prays that *his* peti-
tion may be approved by the court and proceedings
had in accordance with the provisions of said
section.

FRED HOWARD

FRANCES HOWARD

Petitioner

PAUL LEITER

PAUL LEITER

Attorney for Petitioner

United States of America,
District of California,
State of California,
County of Los Angeles—ss.

I, Frances Howard and Fred Howard, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of *my* knowledge, information, and belief.

FRED HOWARD
FRANCES HOWARD,
Petitioners

Subscribed and sworn to before me this 24 day of May, A. D. 1941.

[Seal] ELIZABETH N. DUMESNIL
Notary Public in and for the County of Los Angeles, State of California.

(Official Character.) [3]

That the property herein mentioned in the said petition in proceedings under Section 75 of the Bankruptcy Act is the community property of the parties, and this is a petition filed jointly by the parties hereto.

FRED HOWARD
FRANCES HOWARD

United States of America,
District of California,
State of California,
County of Los Angeles—ss.

I Frances Howard and Fred Howard, the petitioning debtors mentioned and described in the foregoing petition do hereby make solemn oath that the statements contained therein are true according to the best of *my* knowledge, information and belief.

FRANCES HOWARD

FRED HOWARD

Subscribed and sworn to before me this 24th day of May, 1941.

[Seal]

WILLIAM M. CURRAN

Notary Public in and for said County and State.

[Endorsed]: Filed May 26, 1941, 10:37 A. M.
38621-M. [4]

[Title of District Court and Cause.]

APPROVAL OF DEBTOR'S PETITION AND
ORDER OF REFERENCE (UNDER SECTION 75 BANKRUPTCY ACT).

At Los Angeles, in said District, on May 26, 1941 before the said Court the petition of Fred Howard and Frances Howard, husband and wife, that they desires to effect a composition or an extension of time to pay their debts, and such other relief as may be allowed under the Act of March 3, 1933, and within the true intent and meaning of all the

Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to Constantine P. Von Herzen, Esq., one of the Conciliation Commissioners in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Fred Howard and Frances Howard, husband and wife, shall attend before said Conciliation Commissioner on June 2, 1941 and at such time said Conciliation Commissioner shall designate, at his office in Los Angeles, California, and shall submit to such orders as may be made by said Conciliation Commissioner or by this Court relating to said matter.

Witness, the Honorable Paul J. McCormick, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on May 26, 1941.

[Seal]

R. S. ZIMMERMAN,

Clerk

By E. M. ENSTROM, JR.,

Deputy Clerk

[Endorsed]: Filed May 26, 1941, 4:22 P. M. [5]

[Title of District Court and Cause.]

APPLICATION FOR CONFIRMATION OF
COMPOSITION OR EXTENSION PROPO-
SAL UNDER SECTION 75 BANKRUPTCY
ACT.

To the Honorable Paul J. McCormick, Judge of the
District Court of the United States, Southern
District of California, Central Division:

At Los Angeles, in said district, on the 25th day
of September, 1941, now come the above named
debtors and respectfully represent to the court, that
they filed in the Court a schedule of *the* their prop-
erty and a list of their creditors, as required by law,
on the 26th day of May, 1941, and that thereafter,
to-wit, on the 17th day of July, 1941, at the hour of
10:00 o'clock A. M., in the Courtroom of the Hon-
orable C. Von Herzen, Conciliation Commissioner
of the above entitled court, for Los Angeles County,
a meeting of creditors was had, at which time and
place the debtors were examined by the creditors;

Thereupon, by consent of all the parties present,
in person, and by attorneys, the matter was con-
tinued over for hearing to August 6, 1941, at which
time, such matters were heard and business trans-
acted as to cause the said matter to be continued
for further hearing to August 27, 1941, before the
said Conciliation Commissioner, at which time the
debtors informed the said Conciliation Commis-
sioner that acceptance of the composition or exten-
sion proposal as submitted by the debtors to their

creditors had been accepted in writing by all creditors except the Bank America;

That the written acceptance of the proposal included the *secu* secured creditors whose claims are to be affected by the [6] proposal, as well as the unsecured creditors, and represents a majority in number and amount of creditors consenting, Bank America being the only dissenting creditor.

That attached hereto, and made a part hereof the same as if set out in full herein is "Exhibit A", which consists of all the acceptances in writing by creditors agreeing to the composition proposed by debtors.

That all the creditors who consented, as set out in Exhibit "A" had valid and allowable claims against the said debtors and all of said claims were and are allowed.

That there is no debt allowed by priority by law, except the sum of \$12.90 due the County of Los Angeles for street light assessment, and the sum of \$75.00 due and owing to George Smith as and for rent owing to the landlord.

That all federal and state taxes on real or personal property owned by debtors which would have priority secured by the Act, are paid, and were paid at time of the filing of the petition.

That the following is a list of the secured debts with a description of the security of each:

Dana Weller 704 So. Spring Street. Holding a first trust deed of \$300.00 on Ranch property described in the schedule of debtors on

page (3) schedule A-2 thereof. Amount due claimant is \$100.00. Value of property is \$7500.00.

Security First Nat'l Bank 5th and Spring Branch. The security is a note and trust deed in amount of 6146.49 in favor of said bank, on Apartment house situated at 1008 W. 11 Street, and more particularly described in Schedule A-2, pge (3) of the schedule on file in the above entitled cause. Said property is of the value of \$16,000.00.

That the final inventory, and list of exemptions is more particularly set out in the schedules on file in the above entitled cause, reference to which is hereby made, and by such [7] reference made a part hereof the same as if set out in full herein.

Wherefore, debtors pray the said proposal be confirmed by the Court.

Dated: Oct. 15, 1951.

FRANCES HOWARD

.....
Debtors.

[Endorsed]: Filed Nov. 6, 1941. [8]

CERTIFICATE OF CONCILIATION
COMMISSIONER

Undersigned, U. S. District Court Conciliation Commissioner does hereby certify that the first

meeting was held before me; that thereafter continuances as set out in the application for confirmation of composition were had, and finally an offer of composition or extension proposal was duly submitted in time by the debtors, and that the same was duly accepted by a majority in amount and number of creditors, said creditors expressing their acceptance in writing. That in the opinion of the undersigned, the composition is fair and reasonable and is an equitable and feasible method of liquidation for secured creditors whose claims are affected and of financial rehabilitation for the debtor; that it is for the best interests of all creditors, and that the offer and acceptance are in good faith, and is fair and reasonable and approve the said application.

That a question as to whether or not a particular water right should be determined in the State Court, or lawsuit be held in abeyance under and pursuant to section 75 of the Bankruptcy Act has come up, and for that reason it is advisable that the Conciliation Commissioner and the above entitled court retain jurisdiction of the farmers and debtors, and their property.

Dated this 22nd day of October, 1941.

C. P. VON HERZEN

U. S. District Court Conciliation
Commissioner, Los Angeles County

[Endorsed]: Filed Nov. 6, 1941. [9]

[Title of District Court and Cause.]

NOTICE OF HEARING ON MOTION
FOR ORDER

To the Creditors in the Above Entitled Cause and
to Their Respective Attorneys:

You and each of you will please take notice that a motion will be made for an order confirming a composition or extension proposal under Section 75 of the Bankruptcy Act in the above entitled cause on Monday, the 24th day of November, 1941 at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, in Courtroom No. 8, Federal Building, corner of Main and Temple Streets, in the City of Los Angeles, State of California, before the Hon. Paul J. McCormick, Judge presiding.

Said motion will be made on the grounds that all of the creditors being a majority in number and amounts have filed written acceptances of the composition or extension proposal and are willing for the Court to approve the said composition offer and will be based on this notice of motion on the petition of said debtors for an order confirming composition or extension proposal and upon all of the records, files or pleadings in the above entitled cause.

Dated: November 5, 1941.

PAUL LEITER

Attorney for Debtors

[Endorsed]: Filed Nov. 6, 1941, 9:50 A. M. [10]

[Title of District Court and Cause.]

PETITION OF MYRTLE D. A. PECK FOR
LEAVE TO PROCEED WITH THE TRIAL
AND DETERMINATION OF AN ACTION
PENDING BEFORE THE SUPERIOR
COURT OF LOS ANGELES COUNTY,
STATE OF CALIFORNIA.

To The Honorable Paul J. McCormick, Judge of
said District Court:

Comes Now the Petitioner, Myrtle D. A. Peck,
and presents to the Court:

I.

That the petitioner is now and for many years last past has been the owner of and in possession of that certain ranch property situate in the west end of Antelope Valley, Los Angeles County, State of California, consisting of about 1250 acres of land and consisting, in part, of Section 16 in Twp. 8 North, Range 16 West, S. B. M., except for a strip of land 100 feet wide in the westerly portion of said section, owned by the City of Los Angeles and occupied by the pipe-line of the Owens River Aqueduct.

II.

That in addition to the above-described real property, petitioner is also the owner and in possession of a certain pipe-line, right-of-way for the same, and the water flowing therethrough, running from the above-described real property into the hills in

a southerly direction a distance of about five miles, where said pipe-line gathers and takes into its flow the waters [11] of three certain springs; that the petitioner and her predecessors in interest have owned and maintained said pipeline and right-of-way for a period of more than forty years last past, and have continuously maintained said pipeline as a means of conveying the waters from three certain springs at the head of said pipeline, and have continuously used and appropriated all of the water flowing from said springs; that said appropriation of water was made by the predecessors in interest of petitioner herein, in 1894, when the land whereon said three springs are located was public land unappropriated and belonging to the United States Government; that the appropriator of the waters of said three springs also constructed a pipeline to take the waters arising from said three springs and conduct the same to the above-mentioned Section 16, then owned by said appropriator and one of the predecessors of petitioner; that said pipeline was completed about July 1, 1895, and that ever since the completion thereof petitioner and her predecessors in interest have owned, been in the possession thereof, and used said pipeline to convey water from the above-mentioned springs to the said Section 16 for domestic and agricultural uses.

That at the date of the construction of said pipeline across the land of the debtors herein, Frances Howard and Frederick Howard, her hus-

band, and at the date of the completion of said pipeline on July 1, 1895, the forty (40) acres now owned by said debtors was public, unappropriated land belonging to the United States Government; and that, by reason of the construction of said pipeline at said time, the aforementioned predecessor of petitioner, one Henry Hatch, acquired from the United States Government a vested right-of-way for said pipeline over and across the forty acres of land now owned by said debtors.

III.

That the debtors herein, to-wit, Frances Howard and Frederick Howard, her husband, are the owners and in possession of the NE $\frac{1}{4}$ [12] of the SE $\frac{1}{4}$ of Section 31, Twp. 8 North, Range 16 West, S. B. M., in the County of Los Angeles, State of California, and that this is the forty acres of land hereinabove referred to as being public and unappropriated land when the pipeline was constructed and completed across the same on or about July 1, 1895; and that it was not until late in December 1895, or in January 1896, that the predecessor in ownership and interest of said debtors in said forty acres settled thereon, and that patent and title to said land was not passed to the said predecessor in interest of said debtors until about September 3, 1904, which said patent contained a specific exemption in favor of any rights established for ditches, carrying water, and appropriations made while the same was Government land.

IV.

That the aforesaid debtors acquired the above mentioned forty acres of land now owned by them, in January 1939, and soon thereafter commenced to trespass upon the right-of-way wherein said pipeline was located, upon said pipeline, and to appropriate and use water flowing therethrough for irrigation purposes, domestic uses, irrigation of trees, both fruit and ornamental, watering of a large lawn at a house built and established thereon by said debtors, and for use in the establishment and carrying on of a poultry and turkey business established by debtors on said forty acres, and did use said water in an extravagant and wasteful manner. That such use was in violation of the ownership and rights of petitioner and without any right whatsoever in said debtors to so use the water belonging to petitioner and flowing through said pipeline.

V.

That in 1939, petitioner made many objections and protests to said debtors against the use of water flowing through said pipeline, and although the said debtors promised and agreed from time to time to desist therefrom, they did not do so; and that [13] on the 1st day of October, 1940, petitioner commenced an action in the Superior Court of the State of California in and for the County of Los Angeles, numbered 456533, seeking to enjoin the said Frances Howard and Frederick Howard, her husband, debtors herein, from the above men-

tioned continuous trespass upon petitioner's property and appropriation and use of water flowing through said pipeline belonging to petitioner, and for damages and costs; and that a preliminary injunction was granted on November 1, 1940, restraining and enjoining the defendants in said action, to-wit, the debtors herein, from the further or any use of the waters belonging to petitioner and flowing through said pipeline, except for household use and a reasonable amount to sprinkle the lawn then established at the house belonging to said defendants in said action; said restraining order to be in force pending the trial of said action.

That thereafter said action was set for trial for March 5, 1941, and was tried for about five days, and was nearing completion of trial, when the attorney-at-law acting as a judge pro tem, declined to proceed further with the case on the ground that he could not give further time from his private practice to the hearing of said action. That said case by agreement was reset for May 12, 1941, and the trial proceeded before Department 20 of said Superior Court for four days, and was nearing completion when a stipulation was made in open court on May 15, 1941, for judgment in favor of petitioner, the plaintiff in said action, and against said defendants, for a permanent injunction, damages and costs, but allowing defendants a stipulated amount of water for household use only, and said matter was continued to May 26, 1941, to allow time for preparation and presentation of a decree based on said stipulation.

That these debtors, Frances Howard and Frederick Howard, her husband, thereafter and shortly prior to May 26, 1941, disavowed said stipulation made in open court as aforesaid, and refused to [14] permit petitioner's attorney to approve any form of decree based thereon; and that said cause came on for further hearing on May 26, 1941, at which time one Paul Leiter, the attorney for the debtors herein, was associated as an attorney for defendants in said action, and announced that he had that morning filed a petition in bankruptcy under Section 75 of the Bankruptcy Act, and then moved that said cause go off the calendar and no further proceedings be had therein. That the trial judge in Department 20 of said Superior Court declined to grant said motion but continued the further hearing of said action to June 20, 1941, and thereafter, on agreement of attorneys representing plaintiff and defendants, further continued the trial of said action to September 25, 1941, and on further stipulation of attorneys for the parties to said action the same was continued to November 25, 1941, where it is now set for hearing in Department 20 of said Superior Court.

VI.

That the first meeting of the creditors of the debtors in the above-entitled matter was held before the Conciliation Commissioner designated by this Court, on July 17, 1941; that the attorney for petitioner endeavored from time to time, in August and September and in the fore part of October, to

have the report of the conciliation commissioner filed herein, in order that petitioner might proceed under subsection “(o)” of said Sec. 75 of the Bankruptcy Act for leave to proceed with the trial of her action in the State court; that the report of the conciliation commissioner was filed in this Court on November 6, 1941, and the certificate of the commissioner is dated October 22, 1941, and that said report of conciliation commissioner has been set before this Court for hearing for confirmation, for November 24, 1941, at 10:00 o’clock A. M.

Wherefore, Petitioner prays that an Order and citation be issued herein against the debtors, Frances Howard and Frederick [15] Howard, her husband, and Paul Leiter, their attorney, to be and appear before this Court at its courtroom in the Federal Building in Los Angeles, California, on Monday, the 24th day of November, 1941, at 10:00 o’clock A. M., or as soon thereafter as counsel can be heard, to show cause, if any they have, why an Order should not be made herein granting leave to petitioner, Myrtle D. A. Peck, to proceed with the action now pending and partly heard, before said Superior Court of Los Angeles County, State of California, wherein petitioner is plaintiff and these debtors are defendants, No. 456533,—and for such other and further orders as the petitioner may be entitled to in the premises.

MYRTLE D. A. PECK

Petitioner

JAMES P. CLARK

Attorney for Petitioner

State of California,
County of Los Angeles—ss.

Myrtle D. A. Peck, being by me first duly sworn, deposes and says: That she is the Petitioner in the foregoing and above entitled action; that she has read the foregoing Petition and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that she believes it to be true.

MYRTLE D. A. PECK

Subscribed and sworn to before me this 15 day of November, 1941.

[Notarial Seal]

J. H. GOSLING

Notary Public in and for said County and State.

My Commission Expires Sept. 11, 1945.

[Endorsed]: Filed Nov. 17, 1941, 10:54 A. M. [16]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

The Petition of Myrtle D. A. Peck having been filed herein, praying leave to proceed with the trial of a certain action now partly tried and pending in the Superior Court of the State of California in and for the County of Los Angeles, No. 456533, wherein petitioner is plaintiff and these debtors, Frances Howard and Frederick Howard, her husband, are defendants, and good cause appearing therefor,—

It Is Ordered, that Frances Howard and Frederick Howard, the debtors herein, and their attorney, Paul Leiter, be and appear in the courtroom of Paul J. McCormick, Judge of said District Court, in the Federal Building in the City of Los Angeles, State of California, on Monday, the 24th day of November, 1941, at the hour of 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, and then and there show cause, if any, why the petition of Myrtle D. A. Peck for leave to proceed with the trial of the above-mentioned action in the Superior Court of the State of California in and for the County of Los Angeles, should not be granted.

It Is Further Ordered, That service of this Order, accompanied by copy of petition, may be made on debtors and their [17] attorney not less than three days prior to the date of the hearing herein fixed, and time is shortened accordingly.

Dated, this 17 day of November, 1941.

H. A. HOLLZER

Judge

[Endorsed]: Filed Nov. 17, 1941, 9:54 A. M. [18]

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE OF ORDER TO
SHOW CAUSE, AND PETITION FOR
LEAVE TO PROCEED WITH ACTION IN
STATE COURT.

State of California,
County of Los Angeles—ss.

P. B. Neal, being sworn says: That affiant is a citizen of the United States, and a resident of the County of Los Angeles, in the State of California, that affiant is over the age of eighteen years and is not a party to the above entitled action that affiant's residence address is 1002 North Avenue 49, Los Angeles, California; that on the 18th day of November, 1941, affiant personally served Paul Leiter, the attorney for the above named debtors, with order to show cause, requiring the debtors above named and Paul Leiter, their attorney, to be and appear in the Court room of Hon. Paul J. McCormick, Judge of said United States District Court, in the Federal Building, in Los Angeles, California on the 24th day of November, 1941, at 10 o'clock A. M. of said day, and to show cause why the petition of Myrtle D. A. Peck for leave to proceed with the trial of a certain action pending in the Superior Court of Los Angeles County, should not be granted, by delivering to and leaving with the said Paul Leiter personally [19] in the City of Los Angeles, County of Los Angeles, California, at his office 1101 Black Building, a copy of said Order to Show Cause, attached to a

copy of the Petition referred to in said Order to Show cause;

And that affiant on the 17th day of November, 1941, served the above mentioned Order to Show Cause, and Petition therein mentioned, on the above debtors, to wit, Frances Howard and Frederick Howard, by placing a true copy of said Order to Show Cause, to which was attached a true copy of the Petition therein referred to in an envelope addressed to said debtors at their residence address, as follows:

“Frances Howard and Frederick Howard
Lake Hughes, Los Angeles County
California”

and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office, at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or there is regular communication by mail between the place of mailing and the place so addressed.

P. B. NEAL

Subscribed and sworn to before me this 19th day of November, 1941.

[Seal]

J. H. GOSLING

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Nov. 19, 1941, 2:50 P. M. [20]

[Title of District Court and Cause.]

AFFIDAVIT OF PAUL LEITER

State of California,
County of Los Angeles—ss.

Paul Leiter, being first duly sworn, deposes and says: That he is attorney for debtors in above entitled action; that on the 17 day of July, 1941, first meeting of creditors was held, and debtors examined; that said matter was thereafter continued from time to time, the last hearing being on August 27, 1941, which continuances were had for the purpose of attempting to secure a majority in number and amount of creditors to accept a composition. That on the last named date, debtors were finally able to secure the consent of the majority in number and amount to a composition.

That debtors did file application for confirmation of Composition, on or about November 9, 1941, after having secured consent of all creditors except Bank America; that affiant was under the impression that the application for composition confirmation should be filed within 3 months. That affiant glanced at rule 50 of the Supreme court, and discovered his error, in that the rule of court provided for application to be made for confirmation, within 3 months after first meeting of creditors. That if the above entitled court does not make an order permitting the general order rule 50 to be waived, debtors, through no fault of their own, will be

jeopardised, and the interests of justice will have been defeated.

This affidavit is made in pursuance to sec. 203 (of the Bankruptcy act) 11 U. S. C. A. subsection (b) thereof, permitting the court in the interest of justice and for good cause shown, to [21] waive the requirement of said general order 50, and to make an order permitting said debtors the right to have said application for confirmation heard on the 24th day of November, 1941 at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard, and that the filing of the application for confirmation of composition or extension proposal, on or about November 9, 1941, be deemed to have been filed within the time allowed by law, by reason of said waiver of general order 50 of the Supreme Court of the United States.

PAUL LEITER

Affiant

Subscribed and sworn to before me this 18th day of November, 1941.

[Seal]

MAYNARD J. GIVENS

Notary Public in and for said County and State.

[Endorsed]: Filed Nov. 18, 1941, 10:51 A. M. [22]

[Title of District Court and Cause.]

ORDER WAIVING REQUIREMENT OF GENERAL ORDER 50: PERMITTING FILING OF APPLICATION FOR CONFIRMATION.

Upon reading the affidavit of Paul Leiter, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed, that the requirement of General Order 50, of the Supreme Court, that an application for confirmation of composition proposal, be filed by debtors in the above entitled action, within 3 months after first meeting of creditors, be waived, and the debtors in the above entitled cause be deemed to have filed their application for confirmation of composition proposal in time, by having filed said application on November 9, 1941, or thereabouts, and that the hearing on said application for approval of composition, now set in the above entitled court for the 24th of November, 1941, be deemed to be and is hereby ordered to come on for hearing on said date in the same manner, and with the same force and effect as if set down for hearing within time allowed by law, and in conformity with General order 50 of the Supreme Court.

Dated November 18, 1941.

H. A. HOLLZER

Judge, of U. S. District Court
Calif. Central Division

[Endorsed]: Filed Nov. 18, 1941, 9:54 A. M. [23]

At a stated term, to wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 24th day of November in the year of our Lord one thousand nine hundred and forty-one.

Present:

The Honorable Paul J. McCormick, District Judge.

[Title of Cause.]

This matter coming on for hearing on (1) motion for order confirming composition, pursuant to notice, filed November 6, 1941, and (2) petition of Myrtle D. A. Peck for leave to proceed with trial of a certain action pending before the Superior Court of Los Angeles County, etc., pursuant to order to show cause, filed November 17, 1941; Paul Leiter, Esq., appearing as counsel for the debtors; James P. Clark, Esq., appearing as counsel for Myrtle D. A. Peck:

Attorney Leiter makes a statement in support of (1) motion for order confirming composition, pursuant to notice, filed November 6, 1941; Attorney Clark makes a statement in support of (2) petition of Myrtle D. A. Peck, etc.; and Attorney Leiter makes a statement in reply to Attorney Clark.

It is ordered that the petitioner, Myrtle D. A. Peck, be restrained from proceeding further in the

State Court, and that the composition herein be approved and confirmed, without prejudice to the assertion of the rights set forth in the Petition of said Myrtle D. A. Peck and said petition is referred to the Conciliation Commissioner herein, with plenary power, with authority to proceed to hear and determine the issues that are presented by said Petition, subject to the review by proper proceeding by the Judge of this Court. Exception allowed to Petitioner Myrtle D. A. Peck. Counsel for debtors to prepare order thereon. [24]

[Title of District Court and Cause.]

(PROPOSED) ORDER DENYING PETITION
OF MYRTLE D. A. PECK FOR LEAVE TO
PROCEED WITH TRIAL IN STATE
COURT, AND CONFIRMING DEBTORS'
COMPOSITION AND REFERRING MYR-
TLE D. A. PECK'S PETITION TO CON-
CILIATION COMMISSIONER.

The petition of Frances Howard and Frederick Howard for an order, confirming composition offer and extension proposal having come on for hearing before the above entitled Court, on the 24th of November, 1941, and the petition of Myrtle D. A. Peck for leave to proceed with the trial and determination of the Superior Court of the State of California, in and for the County of Los Angeles action, pend-

ing before the Superior Court of the State of California, in and for the County of Los Angeles, being Superior Court case No. 456-533, having come on for hearing before the above entitled Court, on the 24th of November, 1941, said petitioners, Frances Howard and Frederick Howard, being represented by their attorney, Paul Leiter, Esq., and the petitioner Myrtle D. A. Peck, being represented by her attorney, James P. Clark, Esq., and the Court having considered the said petition for confirmation of composition or extension proposal of the debtors and having also considered the petition of Myrtle D. A. Peck for leave to proceed with the trial and determination of the Superior Court of the State of California, in and for the County of Los Angeles, action No. 456533, wherein Myrtle D. A. Peck is plaintiff and Frances Howard and Frederick Howard are defendants, and the evidence upon which said petitions and each of them were based,

Now Therefore, It Is Hereby Ordered, Adjudged and Decreed:

That the prayer of the petition of Myrtle D. A. Peck for leave to proceed with the trial and determination of an action pending before the Superior Court of the State of California, of Los Angeles County, be, and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed, that the petition of Myrtle D. A. Peck, to proceed to determine and hear that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, being case No.

456533, be, and the same is hereby denied, and the petitioner, Myrtle D. A. Peck be and she is hereby restrained from proceeding further in the State Court and that the composition proposed by debtors be, and the same is hereby approved and confirmed, without prejudice to the assertion of the right to set forth in the petition of Myrtle D. A. Peck, the issues raised therein, and said petition is referred to Conciliation Commissioner herein, with plenary power and authority to proceed to hear and determine issues presented by said petition, subject to review by proper proceedings by the judge of this court.

Exception Allowed to Petitioner, Myrtle D. A. Peck.

Dated December 10, 1941.

.....
United States District Court Judge

Approved as to form, as provided in rule 44:

PAUL LEITER

Attorney for Debtors

Not approved; see objections.

JAMES P. CLARK

Attorney for Myrtle D. A. Peck.

[Endorsed]: Lodged Dec. 10, 1941. [26]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED ORDER ON
PETITION FOR LEAVE TO HEAR CAUSE
IN STATE COURT.

Petitioner objects to proposed Order on the following grounds:

(1) That the proposed Order contains a statement that the petition was denied, and this does not conform to the decision made at the hearing, in that the Court stated at the time that the petition was not denied.

(2) That the proposed Order is uncertain, in that it cannot be determined therefrom whether the petition is referred to the Conciliation Commissioner for hearing and report as to whether said petition shall be granted or denied, or whether the reference of the matter to the Conciliation Commissioner is for the purpose of hearing and determining the controversy on the merits involved in the case of Myrtle D. A. Peck, No. 456-533, vs. Debtors, now pending in the Superior Court of Los Angeles County.

JAMES P. CLARK

Attorney for Petitioner

[Endorsed]: Filed Dec. 10, 1941, 10 A. M. [28]

United States District Court, Southern District
of California, Central Division

No. 38621-M. Bankruptcy

In the Matter of

FRED HOWARD and FRANCES HOWARD,
husband and wife,

Debtors.

ORDER DENYING PETITION OF MYRTLE
D. A. PECK FOR LEAVE TO PROCEED
WITH TRIAL IN STATE COURT, AND
CONFIRMING DEBTORS' COMPOSITION
AND REFERRING MYRTLE D. A. PECK'S
PETITION TO CONCILIATION COMMIS-
SIONER.

The petition of Fred Howard and Frances Howard, husband and wife, for an order confirming composition offer and extension proposal having come on for hearing before the above entitled court on the 24th day of November, 1941; and the petition of Myrtle D. A. Peck for leave to proceed with the trial and determination of an action in the Superior Court of the State of California in and for the County of Los Angeles, said action being Superior Court Case Number 456,533, also having come on for hearing before the above entitled court on said 24th day of November, 1941, said petitioners Fred Howard and Frances Howard being represented by their attorney, Paul Leiter, Esq., and the petitioner Myrtle D. A. Peck being repre-

sented by her attorney, James P. Clark, Esq., and the court having considered the said petition for confirmation of composition or extension proposal of the debtors and having also considered the petition of Myrtle D. A. Peck for leave to proceed with the trial and determination of the action No. 456,533 in the Superior Court of the State of California in and for the County of Los Angeles, wherein Myrtle D. A. Peck is plaintiff and Frederick Howard and Frances Howard are defendants, and [29] the evidence upon which said petitions and each of them were based;

Now, therefore, It Is Hereby Ordered, Adjudged and Decreed that the petitioner Myrtle D. A. Peck be restrained from proceeding further in the state court, and that the composition herein be approved and confirmed, without prejudice to the assertion of the rights set forth in the petition of said Myrtle D. A. Peck, and said petition is referred to the conciliation commissioner herein, with plenary power and with authority to proceed to hear and determine the issues that are presented by said petition, subject to the review by proper proceeding by the Judge of this Court. Exceptions allowed to petitioner Myrtle D. A. Peck.

Dated December 10, 1941.

PAUL J. McCORMICK

United States District Judge.

[Endorsed]: Filed Dec. 10, 1941, 11 A. M. [30]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice is hereby given that Myrtle D. A. Peck, petitioner, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from all that part and portion of a certain order and judgment, made and filed in the above entitled matter, on the 10th day of December, 1941, in the above entitled Court, denying the petition of said petitioner for leave to proceed with the trial and determination of a certain action pending in the Superior Court of the State of California, in and for the County of Los Angeles, wherein petitioner is plaintiff and the above named debtors, Frances Howard and Frederick Howard, are defendants, No. 456,533, restraining petitioner from proceeding further in said action, and referring said petition "to the Conciliation Commissioner herein, with plenary power and authority to proceed to hear and determine the issues that are presented by said petition".

Dated January 8th, 1942.

JAMES P. CLARK

Attorney for Appellant
704-706 Grant Building
355 South Broadway
Los Angeles, California.

Copies mailed to Atty. for Debtors & to Conciliation Comr.

E. L. S.

[Endorsed]: Filed Jan. 8, 1942, 12:47 P. M. [31]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS
ON APPEAL

Know All Men by These Presents :

That the United States Fidelity and Guaranty Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto Frances Howard and Frederick Howard, debtors in the above entitled matter, in the plenary sum of Two Hundred Fifty (\$250.00) Dollars, to be paid said debtors, their heirs and assigns; for which payment, well and truly to be made, the United States Fidelity and Guaranty Company, a corporation, binds itself, its successors and assigns, firmly by these presents.

The condition of the above obligation is such that, whereas Myrtle D. A. Peck, the petitioner in said matter, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a certain part and portion of an order and judgment made and filed on the 10th day of December, 1941, denying the petition of said petitioner for leave to proceed with the trial and determination of a certain action pending in the Superior Court of the State of California in and for the County of Los Angeles, wherein petitioner and appellant is plaintiff and the above-named debtors, Frances Howard and Frederick Howard, are

defendants, No. 456533, restraining petitioner from proceeding further in the State court [32] in said action, and referring said petitioner "to the Conciliation Commissioner herein, with plenary power and authority to proceed to hear and determine the issues that are presented by said petition," and which said order and judgment was made by the United States District Court, Southern District of California, Central Division, in the above entitled matter:

Now Therefore, If the appellant shall prosecute said appeal to effect and answer all costs which may be adjudged against her if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the order and judgment is modified, then this obligation shall be void; otherwise, to remain in full force and effect.

It Is Hereby Agreed by the surety that in the case of default or contumacy on the part of the principal or surety, the Court may, upon notice of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed and Sealed, and dated this 8th day of January, 1942.

UNITED STATES FIDELITY AND
GUARANTY COMPANY

By O. D. BRICK

Attorney-in-Fact

Examined and recommended for approval, as
Provided by Rule 13.

JAMES P. CLARK

Attorney for Appellant [33]

State of California,
County of Los Angeles—ss.

On this 8th day of January in the year one thousand nine hundred and forty-two, before me, Agnes L. Whyte a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared O. D. Brick, known to me to be the duly authorized Attorney-in-fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company and the said O. D. Brick duly acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as Surety and his own name as Attorney-in-fact.

In Witness Whereof, I have hereunto^a set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

AGNES L. WHYTE

Notary Public in and for Los Angeles County, State
of California.

My Commission Expires Feb. 26, 1945.

Approved Jan. 8, '42.

PAUL J. McCORMICK Judge

[Endorsed]: Filed Jan. 8, 1942, 3:22 P. M. [34]

[Title of District Court and Cause.]

DESIGNATION BY APPELLANT OF POINTS
ON WHICH SHE INTENDS TO RELY ON
APPEAL.

Myrtle D. A. Peck, Appellant, under the appropriate rule governing procedure on appeal, makes this statement and designation of the points on which appellant intends to rely on this appeal from the judgment and order of the above entitled United States District Court, made and filed herein December 10, 1941, as follows, to-wit:

(1) That the action pending in the Superior Court of the State of California in and for the County of Los Angeles, No. 456533, in which petitioner and appellant is plaintiff and the Debtors, Frances Howard and Frederick Howard, are defendants, was commenced October 1, 1940, and more than four months prior to the filing by Debtors of their petition herein, which was filed May 26, 1941.

(2) That said action was one to restrain the defendants therein from the commission of a continuous trespass upon a certain right-of-way and pipeline carrying water, then in the possession of appellant and belonging to appellant; quieting appellant's title to said [35] right-of-way and pipeline, and for damages and costs.

(3) That on November 1, 1940, and after hearing, the said Superior Court in said action granted a preliminary injunction against defendants in said action, restraining them from the use of water from

appellant's pipeline for any purpose whatever except for household use and sprinkling of a lawn about the defendants' house, and this pending the hearing of the action.

(4) That, as set forth in the petition of appellant for leave to proceed with said action, the same has been partly tried on two occasions and this appellant put to great expense in the trial of said action.

(5) That this appellant has had for many years past, and now has, actual possession of the right-of-way crossing debtors' land and the pipeline lying therein, and that the same has belonged to appellant and her predecessors in interest for more than forty years last past.

(6) That the right-of-way, pipeline, and the water flowing therethrough, were the sole property of appellant and formed no part of the estate of these debtors.

(7) That inasmuch as said action in the State court, set forth in the petition, was to restrain debtors from committing trespass, it was error on the part of the above entitled District Court to restrain appellant from proceeding with said action.

(8) That in an action pending in a State court to restrain a person from committing trespass, and such person afterward becomes a bankrupt, it is error for the bankruptcy court to issue a restraining order staying such proceedings in the State court.

(9) That appellant has already incurred very large expenditure of money in seeking to protect her property and rights from invasion and trespass at the hands of these debtors now in bankruptcy, and she should be permitted to proceed and have said action before the State court concluded.

(10) That under subdivision "o" of Sec. 75 of the Bankruptcy Act, [36] the United States District Court had jurisdiction to hear and determine appellant's petition for leave to proceed in the State court, inasmuch as the Conciliation Commissioner's report had theretofore and on November 6, 1941, been filed in said District Court and was before the Court for confirmation.

(11) That under said subdivision "o" of Sec. 75 of the Bankruptcy Act, it was not a condition precedent that the Court should have before it a hearing and report on the petition for leave to proceed in the State court.

(12) That it was an abuse of discretion, under the circumstances disclosed by appellant's petition, to refuse leave to proceed in the State court with the action in said petition referred to, which had already been tried twice and was ready for a speedy determination,—but for the intervention of Debtors' petition in bankruptcy.

(13) That the Order herein appealed from was erroneous in denying appellant's petition.

(14) That that portion of said Order from which this appeal is taken, referring appellant's petition

“to the Conciliation Commissioner herein, with plenary power and with authority to proceed to hear and determine the issues that are presented by said petition,” is in effect a reference to the Commissioner to proceed and hear in a summary manner the question of title to real property claimed by a third person and one outside of the bankruptcy proceeding.

(15) That the Bankruptcy Court does not have summary jurisdiction without the consent of the adverse party claimant, to hear and determine the property rights of said third person who is in the actual or even constructive possession of property claimed by such third person.

(16) That under the circumstances disclosed in appellant’s petition, any claim to the property made by the debtors or the commissioner in bankruptcy must be tried in a court of competent jurisdiction, either State or Federal, and could not be heard and deter- [37] mined in a summary proceeding by this Conciliation Commissioner.

(17) That, whatever the debts or necessities of debtors’ creditors, the property of this appellant could not be appropriated to satisfy the same, or made a part of the bankrupts’ estate.

Dated, this 17th day of January, 1942.

JAMES P. CLARK

James P. Clark, Attorney for Appellant.

704-5 Grant Building

335 South Broadway

Los Angeles, California (MU-8480)

Received copy of the within designation of points
this 17th day of January, 1942.

PAUL LEITER

Attorney for debtors.

Received copy of the within designation of points
this 17th day of January, 1942.

C. P. VON HERZEN

Conciliation Commissioner.

[Endorsed]: Filed Jan. 17, 1942. [38]

[Title of District Court and Cause.]

DESIGNATION BY APPELLANT OF PAPERS
AND MATTERS TO BE INCLUDED IN
THE RECORD ON APPEAL.

Myrtle D. A. Peck, Appellant, under the appropriate rule governing procedure on appeal, hereby designates the portion of the record, proceedings and evidence to be contained in the record of her appeal herein, and which are necessary for the consideration thereof, to-wit:

(1) Petition of the Debtors, filed herein May 26, 1941, and not including schedules.

(2) Approval of Debtors' petition filed herein May 26, 1941.

(3) Application for confirmation, dated October 15, 1951 (1941).

(4) Commissioner's certificate dated October 22, 1941, filed herein November 6, 1941.

(5) Notice of hearing of application for composition and extensions, filed November 6, 1941.

(6) Petition of Myrtle D. A. Peck for leave to proceed in action pending in Superior Court of the State of California in and for the [39] County of Los Angeles, filed herein November 17, 1941.

(7) Order to show cause as against debtors Frances Howard and Frederick Howard, filed November 17, 1941.

(8) Affidavit of service of order to show cause, filed herein November 19, 1941.

(9) Affidavit of Paul Leiter for Order releasing debtors from default in failure to proceed under Rule 50, and Order, filed herein November 18, 1941.

(10) Minute order dated *October 24, 1941*.

(11) Proposed order prepared by attorney for debtors (not signed), filed herein December 10, 1941, and Objections thereto by petitioner, Myrtle D. A. Peck, appellant herein.

(12) Order of Court of December 10, 1941, denying petition, granting restraining order, and referring Petition to Commissioner.

(13) Notice of appeal.

(14) Bond for costs on appeal.

(15) Reporter's transcript of proceedings at hearing of appellant's petition, December 24, 1941.

(16) This designation.

Dated, this 17 day of January, 1942.

JAMES P. CLARK

James P. Clark, Attorney for Appellant.
704-6 Grant Building
355 South Broadway
Los Angeles, California (MU-8480)

Received copy of the within designation of papers for record on appeal this 17th day of January, 1942.

PAUL LEITER

Attorney for debtors

Received copy of the within designation of papers for record on appeal this 17th day of January, 1942.

C. P. VON HERZEN

Conciliation Commissioner.

[Endorsed]: Filed Jan. 17, 1942. [40]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 40 inclusive contain full, true and correct copies of: Petition for Composition or Extension; Approval and Reference of Petition to Conciliation Commissioner; Application for Confirmation of Composition or Extension Pro-

posal; Certificate of Conciliation Commissioner; Notice of Hearing; Petition of Myrtle D. A. Peck for Leave to Proceed with Action; Order to Show Cause; Affidavit of Service of Order to Show Cause; Affidavit of Paul Leiter; Order Permitting Filing of Application for Confirmation; Minute Order for Confirmation of Composition and Reference of Petition of Myrtle D. A. Peck to Commissioner; Proposed Order Confirming Composition and Denial of Petition of Myrtle D. A. Peck; Objections to Proposed Order; Order Confirming Composition and Referring Petition of Myrtle D. A. Peck to Conciliation Commissioner; Notice of Appeal; Bond for Costs on Appeal; Statement of Points; Designation of Record; which together with the Reporter's Transcript of Proceedings constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to \$11.30, which amount has been paid to me by the Appellant.

Witness my hand and the seal of the said District Court this 14th day of February, A. D. 1942.

[Seal]

R. S. ZIMMERMAN,

Clerk,

By EDMUND L. SMITH

Deputy.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS ON HEARING ON MOTION FOR ORDER CONFIRMING COMPOSITION, AND PROCEEDINGS ON HEARING ON PETITION OF MYRTLE D. A. PECK FOR LEAVE TO PROCEED WITH TRIAL OF A CERTAIN ACTION PENDING BEFORE THE SUPERIOR COURT OF THE COUNTY OF LOS ANGELES, ETC.

Appearances:

Paul Leiter, Esq.,
for Debtors.

James P. Clark, Esq.,
for Myrtle D. A. Peck. [1*]

Los Angeles, California,

Monday, November 24, 1941, 10 A. M.

The Court: Proceed, gentlemen.

Mr. Leiter: That matter, if your Honor please, is an application for confirmation of composition or extension proposal under Section 75, a to r. As the Court can see from the file, the petition and the exhibits, a majority in number and amount of the creditors have agreed to the composition proposal, and the Conciliation Commissioner has made his certificate that in his opinion the compromise is offered in good faith. We have tried to comply with the rule of General Order 50, and I believe

*Page numbering appearing at top of page of original certified Reporter's Transcript.

that the file reflects the consents, as well as the claims, to the proposition offered, which is now up for confirmation.

The Court: Mr. Clark, you are representing the other side?

Mr. Clark: I am representing the petitioner, if your Honor please, for leave to proceed in the state court in a case that was commenced a long time ago. In that case there was involved a water right. My client owned a right of way and a pipe line that ran across the ground of this bankrupt. She and her predecessors had owned that since '94. It was completed in '95 and is very ancient. This bankrupt bought this property in 1939. Then the acts that we complain of took place after that, and after trying by persuasion to get a desist from trespass, on October 1, 1940, we brought the [2] action for injunction, damages and costs, and to quiet the title. The case was tried once before a judge pro tem. We reached about the end of the trial, and the judge pro tem had pressing matters of his own and he had to leave the case, so it was sent back, assigned for trial again on the 12th day of May of this year, and we proceeded to try it and put in four days on it and reached nearly the end again. Then this bankruptcy petition was filed.

Before that, we stipulated in open court for a judgment, but the bankrupt, anticipating this action probably, refused to allow her attorney to approve the decree.

The cause was set for trial and continued. Now we are here asking leave to go on with that trial. It was reset for the 25th of this month, but on account of the appointment of Judge Vickers, before whom it is pending, for a short while to the appellate branch of the Superior Court, it went over to the 5th of December, and there it stands.

Of course, we have no part in this composition. We have not appeared in that matter, and have no objection to it, except the very last clause of the certificate of the Commissioner, which suggests that jurisdiction of this water rights controversy be retained. There is a last paragraph and a general approval in his report that might carry an implication that that was approved also, so we would ask that that approval be withheld as to that part of it until your Honor decides whether or not we are entitled to this leave. [3]

We have set up the matter very fully in the petition, and it is a border-line case as to whether the Federal Court has any jurisdiction at all upon it, because it is not an asset of the bankrupt, but this was property of the petitioner and it was trespassed upon by the bankrupt, and we sought to restrain them, and a restraining order was granted on the 1st of November, 1940, by Judge Wilson, and they are not permitted to use it for irrigation but for household use and sprinkling of the lawn that was around the house, and that injunction is in force now, and has been right along.

Mr. Leiter: Pardon me, Mr. Clark. I don't wish to interrupt, but there is nothing before the court. I know nothing about this petition or any facts alleged, other than the fact that some one served me with a copy of an order to show cause why a certain petition should not be heard today, and also my clients have not been served, because they have not communicated with me. At this time, if your Honor please, I object to any matters being heard before the court other than what is before the court on the application for confirmation.

The Court: The certificate of the Conciliation Commissioner contains the following:

“That a question as to whether or not a particular water right should be determined in the State Court, or lawsuit be held in abeyance under and pursuant to section 75 of the Bankruptcy Act has come up, and for that reason it is advisable that the Conciliation Commissioner and the above entitled court retain jurisdiction of the farmers [4] and debtors, and their property.”

Mr. Clark desires to proceed in the state court to have litigated and determined the controversy that has been provoked, and in so far as that issue is concerned, he is interested in this proceeding.

Mr. Leiter: I will stipulate right now in open court, since I have been served with that order to show cause. I will write a letter to my clients and get an answer to his petition, and also authorities

to this court, showing that the jurisdiction is in this court. We should be given a chance to reply, also, alleging our side of the suit, for the court to determine whether or not the particular water right set out in the deed is a property right and asset of the bankrupt, without which the bankrupt might be forced to lose everything, and the creditors who have consented to wait for their money might be jeopardized, because we have no water, and then, if and when that matter is presented to the court, and it is found to be a property right, the Federal Court has jurisdiction.

I believe there is a section in the Bankruptcy Act—I don't know which it is, because I am not familiar with bankruptcy work—it may be 178—which provides that a trustee in bankruptcy cannot maintain an action in a court where the bankrupt could not have maintained it prior to the bankruptcy, and the Supreme Court, in interpreting that particular section, held that jurisdiction of the property was vested in the Federal Court. That was in interpreting a section of the Bank- [5] ruptcy Act which said that if we could not have brought this action in Federal Court before bankruptcy, then the trustee, the Conciliation Commissioner, or maybe even the farmer, could not bring it afterward. However, I think one of the sub-sections of 75 says “Except upon hearing before the court no proceeding can be had.” It says that jurisdiction shall be in this court. So, if it please this court, I

don't particularly object if the court does not approve the latter part of the sentence that says the Conciliation Commissioner should retain jurisdiction, and would be perfectly willing, if the court or Mr. Clark would consent to a certain time, say a week or ten days, to get my clients in to answer the petition.

I did not represent them in the state court. I would be glad to put in an answer to his petition, and points and authorities, and the court could then determine whether or not this court has jurisdiction or whether or not the state court has, but at this particular stage of the proceeding I am at a particular disadvantage, because, as Mr. Clark knows, I did not appear in any other proceeding than this 75, and I would like to have an opportunity to put in an answer to his petition in support of the order to show cause.

Mr. Clark: As to counsel's statement that the bankrupts were not served, they were served, on the 17th, by depositing a copy of the order to show cause, attached to a copy of the petition, in the post office, and it was mailed to them at their address set out in this bankruptcy proceeding here. [6] That is Lake Hughes, California, up in Antelope Valley. And an effort was made by my process server to serve them. They appeared to be in town, but contact was not made, and after staying two or three hours, the party there at the place said, "Well, probably they are at Lancaster by this time." They departed from town, and the whole circumstances

would lead me to believe that they were avoiding this service. The next morning Mr. Leiter was served, himself, personally. That envelope of the service had my return address on it. The letter never came back, so undoubtedly they received it. Now, if they elected not to reply to it or make any response to it, that is their own affair, but certainly Mr. Leiter had it on the 18th of this month, and the order provided that a copy should be served on him.

Now, as to the jurisdiction, I am in effect conceding the jurisdiction of the Federal Court by making this application under Section *o* of 75 for leave to go ahead in the state court. I am not saying that there is not any jurisdiction. I say it is doubtful, it is questionable; but conceding the jurisdiction of the Federal Court, I am asking leave to go ahead. The authorities certainly are ample, and I have many of them here, where leave had been granted to the state court, and it is rather favored, particularly in a case that has long started and was partially tried before this bankruptcy proceeding was commenced, and the circumstances of the bankruptcy lead me to believe that they were dodging into the arms of the [7] bankruptcy court to avoid a judgment.

The Court: I am just wondering whether the jurisdiction should not be before the Conciliation Commissioner instead of the state court.

Mr. Clark: I have authorities on that point, your Honor. They hold that the order under sub-section

o should be made by the judge, and there is a very recent decision, the McFarland case, 112 F. (2d), in which the Ninth Circuit construed the language of that sub-section *o*. There has been some doubt about it, and it is a bit ambiguous, but they finally set it at rest by holding that that language, "after hearing a report by the Conciliation Commissioner," meant his report on the adjustment with creditors, such as has been filed here. That is what has been holding me up all the time.

The Court: I think I remember having read that case, but I don't remember the principle applicable here, McFarland against West Coast Life Insurance Company, 567?

Mr. Clark: Yes; that is it, your Honor.

The Court: Judge Wilbur's concurring opinion throws light on the real crux of the problem, it seems to me, that while here there was objection, in the McFarland case there was no objection urged by anyone to the court making the order that it did make, and therefore the question of jurisdiction was properly decided, that it had power to make the order. Judge Wilbur throws a good deal of light on our problem in his concurring opinion, where he cites the case of Union Joint [8] Stock Land Bank v. Byerly. We will read a little of it. I can't pick out the part that I think is germane without reading the context. "I concur in the conclusion reached." He concurs in the conclusion reached that the lower court clearly decided the question of the jurisdiction and power to hear the

petition for leave to foreclose the lien. That is all the lower court decided, and Judge Wilbur says he concurs in the conclusion reached. "I believe, however, that the phrase in subdivision *o* of Section 75, quoted in the main opinion, refers to a hearing and report by the conciliation commissioner upon the petition for leave to enforce a lien upon the property of the farmer."

That means, it seems to me, that the proper method, if the petition is properly filed under Sec-75, *a* to *r*, is to divest the state court, or any other court, of authority over the res and transfer it to the court of the Conciliation Commissioner, and that all matters are to be adjudicated and determined in that forum, subject to review by the judge of the court. That was the view that I suggested I thought would be the proper course to take, and I think that view is strengthened by Judge Wilbur's concurring opinion.

Mr. Clark: Did your Honor notice that in the majority opinion, the two judges concurring specifically construed that language, but they did not at all agree with Judge Wilbur, who was more or less dissenting on that? But they construe the language of sub-section *o* to mean the hearing as to creditors [9] and settlement of their claims, and that report was the report of the Conciliation Commissioner, filed with the judge of the District Court for confirmation. As I recall it, that is the exact construction of the language.

The Court: That is true. They do say that.

Mr. Clark: That is the majority, and they said

that was the only proper construction of the section. It seems to me that the opinion of the court would be the controlling pronouncement in that case.

The Court: Unless, of course, it was just dicta. The only point before the appellate court was the question as to whether or not the lower court had erred in assuming jurisdiction to make the order which it did, permitting the sale. Now the record shows that they all acquiesced in the hearing, shows there was no dissent and no objection to the procedure. The only question was one of jurisdiction, whether the court had power to do it under the statute. That was the question decided. What they said in deciding it, I think, is pure dicta, and it seems to me that we have as much right to give weight to the reasons which are asserted by the third concurring judge as we have to those of the majority judges. There is no dissent. They all agree that the judgment should be affirmed that the court had jurisdiction to do what it did. The only difference is that in analyzing the case the third judge says that he does not agree with his associates that the power of the court was the action of the judge. He says that [10] the court had a greater power than that if it sought to exercise it, which it did not seek to exercise in the McFarland case. He says: "As stated in the main opinion, the appellant consented to a hearing of the application by the court before the hearing on the confirmation of the proposal for composition and ex-

tension. The appellant did not object to the hearing of the application of the appellee for leave to sell upon the ground that a prior hearing before the conciliation commissioner was necessary."

In other words, they all acquiesced. There was no affirmative opposition interposed by anyone to what the court was doing, but they questioned the power of the court to do anything at all.

Judge Wilbur says: "Not having made the point in the court below he cannot make it in this court."

I think that bears out this court's deduction that what the appellate court decided was the power, the jurisdiction of the lower court to make any order, and the three judges in the appellate court said they agreed that the judge in the lower court had the right to make an order, but they don't go into the question as to whether or not the lower court had the right to say, "Well, now, we shall not permit the state court to proceed with its proceeding, but we shall take over the entire matter and refer the adjudication of the settlement of this claim to the conciliation commissioner."

Your claim is a little different than the claim in the [11] McFarland case. They were claiming a right to sell his property under a trust deed to enforce the lien. What you are asserting is the right to the right of way and the uninterrupted use of that pipe line. It may be that they fall in the same category, but they are not precisely the same type of relief sought. But regardless of the specific relief, they are both proceedings in the state court.

In the McFarland case I believe it was a sale under a trust deed that did not require foreclosure.

There is a footnote here under the main opinion, under footnote 2. The main opinion states this: "To what 'hearing and report' does the statute refer? So far as we are advised, the decided cases afford no answer to the question. It was present in *Union Joint Stock Land Bank of Detroit v. Byerly*, 60 S. Ct. 773, * * * decided April 22, 1940, in which the Court of Appeals for the Sixth Circuit was reversed. 106 F. 2d 576. But neither court undertook to interpret the phrase. Whatever may be the preliminary step required by it, the step had not been taken in that case for no commissioner had as yet been appointed at the time the court 'erroneously' permitted a sale."

Footnote 2 reads thus: "2 In *Union Joint Stock Land Bank of Detroit v. Byerly*, supra, it was held error for the district court, in the absence of the preliminary step required by subsection *o*, to permit a sale, but it was said the court had jurisdiction in the premises. However, it was pointed [12] out that until confirmed by the court the sale amounted to no more than an unaccepted offer to purchase. Such is not the situation here, since under the California law a sale under a deed of trust is absolute and cuts off the debtor's equity of redemption."

Now, doesn't that all just spell this, that in the hearing of these petitions the court has the power to hear them either simultaneously, concurrently, or

has the power to hear even the petition of the kind that Mr. Clark's client has projected, in advance of the petition for composition or extension. It now is proposing to hear the two of them concurrently, and in view of the Conciliation Commissioner's certificate in which he says there is in dispute here, in abeyance, the determination of the right of way over this property for pipe line purposes, Mr. Clark comes into court, on the day that is set for the hearing of the petition to compose the debt or extend it, and asks leave to proceed with his case in the state court.

It seems to me that this McFarland decision is absolute authority on the right of this court to say whether he shall have the right to proceed or not; and if it says so, then as a corollary it has the right to say, "Well, instead of proceeding in the state court we will proceed in this court."

Mr. Clark: On that, I read the Byerly case and those other cases cited, and they did touch on the jurisdiction question, that no report had been filed by the Conciliation [13] Commissioner, and under subsection *o* a report must precede the vesting of jurisdiction or the action of the District Court under whatever jurisdiction it has, to grant leave to proceed in some other case or to sell some asset.

As your Honor points out, we are not foreclosing a lien that affects the property rights of the bankrupt, or to sell any property, but we are seeking to try and go on and complete a case that was initiated long before this bankruptcy.

Now, what was the point of the appeal of the bankrupt in the McFarland case? His point was, as I take it from the case, that no report had been filed by the Conciliation Commissioner involving the question of leave to sell that particular property or on that matter. Otherwise, I don't understand that his appeal had any point at all; and it was in response to that that the judge who wrote the opinion made his construction of subsection *o*.

I have listed dozens of cases, and that is the first and only case that has come out flat-footedly and construed that section and said that the hearing and report mentioned in that section referred to the report of the Conciliation Commissioner on the adjustment and settlement and until that is filed it is improper to seek leave of the court to proceed. Now, it is the court that grants the leave. After all, the Act vests that authority absolutely in the District Court, in the Federal Court, and it has to be preceded by a report of the Conciliation Commissioner. That is the language of sub- [14] section *o*, and when they say that the hearing and report referred to in that part of the Bankruptcy Act providing that until petition is made to and granted by the judge after hearing and report by the Conciliation Commissioner a proceeding for the sale of property under lien shall not be instituted, it does not refer to a hearing and report by the Commissioner on the petition for leave to sell. It says specifically that it does not refer to that but refers to the hearing before the Commissioner of the debtor's composition

and extension proposals, and the Commissioner's report thereon.

Now, we have that filed on the 6th, and as we have set out the proceedings, I was waiting all summer and fall for them to get that report in. As the Commissioner states in his report, the first hearing before creditors was on the 17th of July. His certificate is signed on the 22nd of October and filed here on the 6th of November. If that language expressed by the majority in that McFarland case means anything, it is clear that it is the first flat-footed construction of the meaning of sub-section *a* and decides specifically that it is not a hearing on the application to proceed but it is the hearing of the creditors and the adjustment of debts and the Commissioner's report as to what should be done as to those debts.

As far as that is concerned, we have no part in the proceedings before the Commissioner. On an ex parte application of Mr. Leiter, there was a restraining order issued. I at- [15] tended the hearing to learn what was going on, and the Commissioner asked me for a statement of this matter. I told him what it was. With the agreement of Mr. Leiter, that restraining order was then dissolved by the Commissioner, with the understanding that I would proceed and make the application before the court at the proper time, and I have been waiting all the time to do it, knowing that that McFarland case has set up that that report had to be here before we could apply to the judge, and when it was here the judge had the jurisdiction to consider the matter.

The court distinguished this case that is before you from this application for leave to sell an asset of the business. We are not seeking to sell anything that belongs to her, but we are claiming a right to restrain these people from their repeated trespass, and incidentally determine whether or not there is any water right.

The federal cases are full of decisions where the state court has been allowed to proceed. In a very recent case, *Sherman v. Buckley*, 119 F. 2d 280-282: "In spite of the fact that the jurisdiction of the bankruptcy court is usually described as 'exclusive,' it may consent to have the interests of third persons in property of which the bankrupt had possession adjudicated in a state court if that is more convenient."

The Court: I don't think you need cite those, Mr. Clark. I think it is a discretionary matter. Both forums have concurrent jurisdiction, I think, in bankruptcy, in determination [16] of those rights. The question is not one of the right of the court to do it, but it is the proper exercise of discretion as to whether it should be done, and this is what appeals to the court rather strongly. If the spirit of Section 75, *a* to *r*, is to afford a farmer debtor a reasonable opportunity to rehabilitate himself, first, by endeavoring to get a majority of his creditors to agree to withhold the enforcement of their legal rights, and if the farm, or ranch as we call it here, needs water, which it does, I think, query: aren't we defeating the whole purpose of the stat-

ute by permitting another forum to determine in an independent action the whole crux of this problem? Because the crux of this problem is the ability of the farmer debtor to rehabilitate himself out of his property after having obtained the agreement from his creditors that he may have a reasonable time in which to do so. Now, if, after having so agreed, the court permits some other forum to adjudicate and determine the right to the sinew of war, to-wit, the water, aren't we using our discretion in such a way as to defeat the whole spirit of the Act?

Mr. Clark: In reply to that I would say that the Federal Court could not and would not lend itself to the appropriation of the property of a third party, and that is exactly what we claim here, that this water for many years has belonged to the petitioner, and for over forty years to her predecessors in interest.

The Court: I agree with you there. [17]

Mr. Clark: Can the bankrupt commit a trespass and take this water for their use and expand its use and all that? We are not responsible for her creditors, and we wouldn't be called upon, under the law, to furnish anything to liquidate or pay her creditors. She has a well that she drilled on this place that is for the purpose of irrigation, but because she didn't seal it when she drilled it, it is not good for ordinary household uses.

The Court: Our minds are not together, Mr. Clark. I am not prepared to dispute the verity of

what you say. I am talking about a forum to try the issues. You are talking about the merits of an issue. I am talking about a place where that issue should be tried, and you are talking about the merits of the issue itself.

Mr. Clark: The only place a trial could be had upon the merits would be before some judge of the Federal Court, certainly not before the Conciliation Commissioner.

The Court: Why not? Where is there a case or a statute that says that the judge shall try it? Isn't the purpose of the Act to refer these matters, ab initio, to the Conciliation Commissioner, to have him determine that issue, subject to review by the judge of the Federal Court? Suppose someone wants to foreclose a lien on the property, or a mortgage, and they have commenced their suit in another court before the farmer debtor seeks to apply the relief provisions of the Bankruptcy Act and Section 75, doesn't that transfer to this court? [18] Isn't that the plain meaning of sub-section *c*, that all others shall hold off until such time as the court—and that means the Conciliation Commissioner, when it is referred—shall hear the matter? It doesn't mean the judges shall devote their time to these debtor proceedings ab initio.

Mr. Clark: If your Honor please, the action in the Federal Court is stayed, but we are talking about trying the case on the merits. That is what we are asking leave to do, and I think the disposition of the Federal Courts has been to grant the right

to proceed in the state court, particularly where the question of the possession of the bankrupt is doubtful. It seems to me that this is doubtful.

If here is a property that a third party claims they have a right to, and the third party is in possession on the right of way and the pipe line, and we are seeking only to restrain the bankrupt from trespassing on it, then that is an issue that should be tried, ordinarily, in the state court; or, conceding the possession of the bankruptcy court, it is one that should be relegated to the state court.

There is a case right on that particular point where the question of possession itself is doubtful, a recent case—I think I read your Honor that one—no, I didn't—where they held that the bankruptcy court may permit a mortgage or trust deed to be foreclosed in state court on a showing of entire lack of equity. That is *Comer v. John Hancock Mutual Life Insurance Co.*, 80 F. 2d 413, on allowing the state court to [19] try the question of title—this is the point—to property in the actual or constructive possession of the bankruptcy court where the court feels that the matter may be more expeditiously determined and possession of the bankruptcy court is perhaps doubtful.

The Court: That is the point exactly. I don't think there is any doubt about the possession of the res, as far as this proceeding is concerned. There may be, and there is, undoubtedly, from the petition that has been filed, an issuable question as to the right of way of this pipe line, as to wheth-

er or not they are permitted to tap the pipe line and take any portion of the water, or as to whether they are encroaching upon the owner of the right of way and the easement. There is an issue on encroachment upon the easement.

There is no doubt in my mind, unless there is some authority that I haven't in mind (and there may be) that we have the authority to permit the state court to proceed, if we think the circumstances are such, in the exercise of discretion, that we ought to do so, or to require that it be retained here. I don't think there is any question about that. Very often we do this in cases: We permit the state court to proceed, without the right to execute the judgment, until such time as the matter is brought to the court's attention here where it can be supervised by the bankruptcy court.

Mr. Clark: As to any damages or costs, the court would retain or could retain jurisdiction of it, but could allow [20] the state court to try the title, and particularly where so much money has been already expended and the case has been partly tried, with just a small piece of it remaining before the judge would render a decision. It seems to me if there ever was a case where leave would be granted to proceed in the state court, conceding the jurisdiction of the Federal Court, that leave would be granted here, because it would be expeditious, as this case cites here. That is a very recent case. Let me call your attention to that case. I didn't give you the citation. It is in the Matter of

American Fidelity Corporation, Ltd., a California case in 1939, a very late case, 28 F. Supp. 462. There it was doubtful whether the court had jurisdiction of the matter or not, but the question was whether it could be more expeditiously determined. In all other cases they have said "at less expense."

We have spent all the money; we have tried this case practically twice in the state court, and we feel that we ought to be allowed to proceed and finish it up.

Mr. Leiter: If your Honor please, I don't believe a true picture has been presented to the court, for the following reasons: In the first place, the order to show cause says "show cause why petition should not be granted" and "to be served upon her." The order has not been complied with.

There are always two sides to a lawsuit, and we don't even claim under a purported color of title. We have title to use the water for certain purposes. Whether "domestic purposes [21] of the farmer" means for taking a shower or watering stock is questionable. Counsel has gone to great length to prove that the case must be tried. If our petition were before the court, the court would have the following matter before it and could decide that the Federal Court should hear it, for the following reason: The very purpose of the Act was that when a farmer is overwhelmed he can come into the Federal Court. The only time a farmer can come into the Federal Court, under a

to r, of course is when he cannot get relief from a state court, or creditors are pressing him.

In this particular instance, our petitions would deny the allegations of Mr. Clark; and aside from the fact that no stipulation was agreed on, the judge was so unfamiliar with Section 75—in state court a lot of lawyers are unfamiliar with Section 75, too—that at first he expressed doubt from the bench as to whether this court could even stay him from acting, (and I was compelled to get a restraining order to restrain Mr. Clark from proceeding) and I could not get an order to show cause directed to the Court.

The Conciliation Commissioner told Mr. Clark the reason he issued that restraining order, which was unnecessary because there is an automatic stay, was because he was informed the court would proceed anyway.

There is no further need for that restraining order being there. The court has made the remark from the bench, and it is in the record, that if it takes a day, a month, a year, he [22] is going to determine the matter. He even suggested that Mr. Clark amend his complaint to ask for more damages.

We feel the very purpose of the act is defeated in permitting this to go back to the state court. If we are trespassers, this court is equally competent, if not more so, to determine whether or not we are trespassing. I believe, if your Honor please,

in the interest of justice, as well as to carry out the acts of Congress, the farmers and their property should be under the jurisdiction, and that if anything, this court should exercise its discretion and retain jurisdiction in this court.

Mr. Clark: Before your Honor makes decision, if you will look at the schedule there before you, you will see that these people were apartment house owners, one forty-room apartment house, owned, not leased and run. Their farming business is just a colorable thing because they have a little chicken ranch out there.

The Court: Of course, there should have been objection. If the objection were made that they were not actually bona fide farmer debtors, we could have determined that.

Mr. Clark: Counsel has made such a plea about this poor farmer, I don't know whether your Honor would——

The Court: I am not considering the merits of the matter at all. I don't think that is before us. I am trying to avoid it and at the same time do what I think should be done. I think we will take the position that we will continue the [23] restraint against the proceeding in the state court, and confirm the order of the Conciliation Commissioner on the composition and extension, without prejudice to the assertion of the rights set forth in the petition of Myrtle D. A. Peck before the Conciliation Commissioner, to whom that petition is referred, with authority to proceed to hear and determine

the issues that are presented by said petition, subject to review by proper proceeding before the judge of this court.

It seems to me that is the proper order to make. If the creditors, or any of the creditors, take the position that this is not a good faith proceeding, that the petitioners are not farmers within the meaning of the Act, that does not foreclose an inquiry upon that, except possibly as far as those creditors who have acquiesced in the composition are concerned, and, on the other hand, if we should relinquish the control of the determination of the right to the water, there isn't any asset there at all; the asset is gone, if there is any asset.

Mr. Clark: The asset is in the forty-room apartment house that is in the possession of the bankrupt.

The Court: I am not talking about that. There has been no proceeding before the court questioning the right of these people to employ Section 75. The petition of Peck does not recite that. The petition of Peck assumes that the court has jurisdiction under Section 75 to hear the matter, but it asserts that there is a right of way which is being encroached [24] upon by the petitioner. That can be litigated here just as satisfactorily, and I think perhaps more justly, than it can in other forum. I am not speaking of any particular forum.

The whole project there depends on water. If there is no water, there is no ranch. You can't feed turkeys or raise crops without water. I am talking

about ranch property. I am not talking about taking a bath, either in a ranch or apartment house. If they have no right to the water, it will fail. Then they may go under sub-section s, which will complicate it more.

Mr. Clark: They do raise turkeys. They have a well they claim they water them with.

The Court: You prepare the order, Mr. Leiter, and serve it upon Mr. Clark.

Mr. Clark: That is a denial of the petition, your Honor?

The Court: No; I am denying the prayer of the petition to transfer the proceeding from this court to the state court. I am continuing the order of injunction in force. The restraint that is already in effect is continued in force until the further order of this court, and I am referring the petition of Peck to the Conciliation Commissioner for further consideration, with plenary power to determine the issues that are framed by it, subject to review of the decision of the Conciliation Commissioner by the judge of this court.

Serve the order on Mr. Clark, and he will endorse it.

You may have an exception to the ruling, Mr. Clark. It [25] may be that you will want it reviewed.

Mr. Clark: The reason I asked if you denied the petition was that we might consider appeal.

The Court: I am not denying the petition. You may be right on the merits. I am not saying that you are not.

Mr. Clark: This petition was merely for leave to proceed.

[Endorsed]: Filed Jan. 17, 1942. [26]

[Endorsed]: No. 10052. United States Circuit Court of Appeals for the Ninth Circuit. Myrtle D. A. Peck, Appellant, vs. Frances Howard and Fred Howard, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed February 16, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the Circuit Court of Appeals for the
Ninth Circuit.

No. 10052

MYRTLE D. A. PECK,

Appellant,

vs.

FRANCES HOWARD AND FREDERICK
HOWARD,

Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON THE
APPEAL, AND DESIGNATION OF THE
PORTIONS OF RECORD FOR CONSID-
ERATION THEREOF.

A. For a statement of points to be relied upon under Rule 19(6), on this appeal, appellant hereby refers to and adopts appellant's statement of Points under Rule 75(d), Rules of Civil Procedure, heretofore filed in the United States District Court, and set out in the Clerk's transcript of record at pages 35-38 inclusive.

B. Appellant further designates as portions of the record to be printed the whole of the record on appeal, as certified by the Clerk of the District Court and filed herein, including the reporter's transcript, as necessary for the consideration of appellant's points on appeal.

Dated February 13th, 1942.

JAMES P. CLARK

Attorney for Appellant.

Received copy of within designation of Points and portions of record to be printed this 13 day of February, 1942.

PAUL LEITER,

Attorney for Appellees.

[Endorsed]: Filed Feb. 16, 1942. Paul P. O'Brien, Clerk.